

**Avenal Energy Project PSD Permit
APC's Request to EPA for 18-Month Extension
of the PSD Permit's Deadline for Commencing Construction
Background and Analysis
June 26, 2013**

Background

In a letter dated December 19, 2012, Avenal Power Center, LLC (APC) requested that the U.S. Environmental Protection Agency (EPA) provide an 18-month extension of the deadline for commencing construction under the Prevention of Significant Deterioration (PSD) permit for the Avenal Energy Project (AEP), pursuant to 40 CFR 52.21(r)(2). In a letter dated February 15, 2013, APC provided more detailed information concerning the basis for its request, including the reasons why APC has been unable to commence construction on the AEP to date and why APC believes that an 18-month extension is necessary.

The PSD permit that EPA issued for the AEP became effective and final on August 18, 2011, at which time APC was granted legal authority to construct the AEP for PSD purposes. The PSD regulations at 40 CFR 52.21(r)(2) provide that approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. 40 CFR 52.21(r)(2) further provides that EPA may extend the 18-month period upon a satisfactory showing an extension is justified. APC submitted its justification for an extension of the period for commencing construction prior to February 18, 2013, *i.e.*, 18 months after August 18, 2011, the date on which APC received approval to construct the AEP.¹

Discussion

I. An Extension of the Deadline for Commencement of Construction Is Justified

APC's letters provided an overview of some of the procedural history relating to EPA's PSD permit decision for the AEP. Of particular relevance to this extension request is the delay in EPA's processing of its PSD permit decision for the AEP, and the associated determination by EPA to grandfather the PSD permit application for the AEP from demonstrating compliance with new PSD permit requirements that became effective more than one year after EPA determined the PSD permit application for the AEP to be complete. EPA had initially taken the position that the AEP would be required to demonstrate compliance with these new PSD permit requirements. EPA's later decision to grandfather APC's PSD permit application for the AEP from the new PSD permit requirements is at the heart of the pending petitions for review challenging EPA's PSD permit decision for the AEP before the Ninth Circuit Court of Appeals (Ninth Circuit), and the Ninth Circuit has not yet issued a decision in the case. APC's letters explained that APC has

¹ It should be noted that EPA has discussed PSD permit extensions in various policy documents, including several mentioned below.

been unable to commence construction of the AEP due to uncertainty resulting from this pending litigation before the Ninth Circuit. APC explained that although the petitions for review were filed with the Ninth Circuit by November 2011, and the case had been fully briefed by May 2012, the Ninth Circuit has not yet issued a decision, and oral argument has not yet been scheduled. We note that as of the date of this extension request analysis, EPA has not received any information from the Ninth Circuit indicating when oral argument will be scheduled.

APC noted that according to a recent report from the Ninth Circuit Court of Appeals, the Ninth Circuit takes an average of 17.4 months from the date of filing to the resolution of an appeal. APC sought expedited review from the Ninth Circuit through an unopposed motion that it filed in May 2012, but the Ninth Circuit denied this request. APC also noted that in an average case, the Ninth Circuit issues a decision within six weeks of oral argument.

APC further stated that, due to uncertainty resulting from the ongoing litigation, it is unable to commence construction by entering into either a continuous, physical onsite construction program or an irrevocable contract for such a program. Although the pending litigation per se does not preclude APC from commencing construction, APC explained that it is unable to complete the detailed project design and scope necessary to obtain financing and execute binding contracts with suppliers until there is certainty in the project's ability to move from construction to commercial operation. In particular, APC noted that the approximately \$500-600 million in necessary financing for the AEP cannot be obtained from a lending institution as the legal authorization for the project could be delayed or rendered invalid by the outcome of the pending litigation, and that without such financing, the project cannot reach final design or commence construction. APC stated that it has spent millions of dollars to date and continues to spend money to maintain the viability of the AEP.

With respect to the length of time requested for the extension, APC stated that it is unable to commence construction immediately upon a favorable decision from the Ninth Circuit, as APC will need to obtain financing, complete engineering, and satisfy all of the California Energy Commission's (CEC) preconstruction requirements, which will take significant time. APC noted that the date and nature of the Ninth Circuit's decision is unknown at this time, and stated that the necessary contracting, documentation and preconstruction filing obligations of the CEC alone could result in a 12-month delay in starting construction from the date of any ruling by the Ninth Circuit. APC concluded that the timing considerations involving the Ninth Circuit litigation and the required activities (including CEC preconstruction obligations) to move to construction as soon as possible following the ruling necessitate an 18-month extension of the deadline for commencing construction under the permit.

As stated above, 40 CFR 52.21(r)(2) provides that EPA may extend the 18-month period for commencement of construction under a PSD permit issued pursuant to 40 CFR 52.21 upon a satisfactory showing that an extension is justified. In this case, EPA Region 9 has considered all of the information provided by APC in support of its request for an extension of time for commencing construction of the AEP. We have also considered the larger procedural history of this PSD permit decision that led to the litigation, and the primary issue that is being considered in the litigation, *i.e.*, EPA's decision to grandfather APC's PSD permit application for the AEP from making a demonstration that it meets certain PSD requirements that became effective more than one year after its PSD permit application had been determined complete. While the Ninth Circuit litigation per se does not preclude APC from commencing construction as authorized

under the permit, we find that given the history of this permit proceeding, the grandfathering issues currently under consideration in the litigation before the Ninth Circuit produce significant uncertainty regarding the continued effectiveness and the specific requirements of the PSD permit for the AEP until the Ninth Circuit issues a decision on the grandfathering issues. After consideration of all of the above, EPA has determined that a satisfactory showing has been made to justify an 18-month extension of the deadline in the PSD permit for commencing construction of the AEP.

Region 9 finds that APC's request for an additional 18 months for commencing construction of the AEP is reasonable and justified, focusing on the following factors: (1) the procedural history and attendant delays in EPA's processing of the PSD permit application for the AEP and the circumstances of EPA's associated grandfathering decision for this permit application; (2) the nature of the grandfathering issues under consideration in the pending litigation challenging the PSD permit for the AEP in the Ninth Circuit; (3) the duration of the pending litigation and the fact that the Ninth Circuit has not yet issued a decision; (4) the significant uncertainty stemming from this litigation regarding the continued effectiveness of the current PSD permit and the specific requirements that AEP must meet under the PSD program; (5) the negative impact on the availability of financing for this \$500-600 million dollar project arising from this uncertainty; (6) the difficulties APC faces in proceeding with design and scoping of the project due to the uncertainty; (7) the inability of APC to enter into contracts for construction without completing additional design and scoping work; and (8) the need for additional time following a decision by the Ninth Circuit, if favorable, for APC to secure financing, enter into contracts for design and construction, complete final design, and satisfy the CEC's preconstruction requirements.

Region 9 has determined that it will extend the deadline for commencing construction for the AEP by 18 months from the date the deadline would otherwise have run, to August 18, 2014. The PSD permit for the AEP includes a condition that reflects the language in 40 CFR 52.21(r)(2), thus Region 9 is issuing a document that administratively amends Condition I of the APC PSD permit for the AEP to incorporate this change. Accordingly, the deadline in Condition I.A is being amended to read as follows:²

I. PERMIT EXPIRATION

As provided in 40 CFR § 52.21(r), this PSD Permit shall become invalid if construction:

A. is not commenced (as defined in 40 CFR § 52.21(b)(9)) within 36 months after the approval takes effect; or ...

² For clarity, we show the amended language in Condition I in redline/strikeout:

I. PERMIT EXPIRATION

As provided in 40 CFR § 52.21(r), this PSD Permit shall become invalid if construction:

A. is not commenced (as defined in 40 CFR § 52.21(b)(9)) within ~~18~~36 months after the approval takes effect; or ...

All of the other conditions of the PSD permit, including Conditions I.B and I.C, are unchanged, and remain in place, effective as written.

II. No Additional Procedure Is Required Under 40 CFR Part 124 or Otherwise for Granting this Extension Request

As discussed above, 40 CFR 52.21(r) gives EPA discretion to extend the 18-month commencement of construction deadline for PSD permits issued under federal authority where EPA determines that a “satisfactory showing that an extension is justified” has been made.³ The regulation indicates that EPA should exercise this discretion on a case-by-case basis, evaluating whether the showing offered for a particular extension is satisfactory and, accordingly, whether an extension is justified for a particular permit. The text of 40 CFR 52.21(r)(2) does not provide any specific criteria or required process that must be satisfied before EPA can exercise its discretion to determine that a permit extension is justified. Thus, EPA’s interpretation that a case-by-case evaluation of the particular facts of the case is appropriate for determining whether to grant a permit extension is a permissible and reasonable interpretation of the regulation. Based on the circumstances in this case, Region 9 has concluded that it will grant a permit extension to APC for the AEP as explained above.

Considering all of the information discussed above, Region 9 does not believe that in this case it would be equitable, or an appropriate use of EPA resources, to require APC and Region 9 to re-analyze substantive PSD requirements for the AEP in order to show that an extension of the 18-month commencement of construction deadline is justified under 40 CFR 52.21(r)(2), particularly as the initial PSD permit decision for the AEP remains subject to judicial review before the Ninth Circuit, and the Ninth Circuit has not yet issued a substantive ruling regarding EPA’s decision to grandfather the AEP permit application from certain new PSD requirements. The Region has therefore focused its analysis under 40 CFR 52.21(r)(2) in this case on the justification for APC’s delay in commencing construction and for the particular extension requested, and the larger context of the grandfathering issues being considered in the litigation, as discussed above.⁴

Because this action only extends the deadline to commence construction under the permit without revising or reconsidering the substantive conditions of the permit (or APC’s showing that it has satisfied the criteria for obtaining the PSD permit), Region 9 has determined that this action is not subject to the procedures in 40 CFR Part 124. The provisions in Part 124 do not reference extensions of PSD permits. EPA notes that section 124.15 does state that a “final

³ The Clean Air Act does not expressly include the 18-month deadline in 40 CFR 52.21(r)(2) or the provisions for extending that deadline. Thus, EPA’s analysis focuses on the regulatory text.

⁴ We note that APC’s February 15, 2013 letter asserts that while APC continues to object to the application of any standards adopted after EPA’s statutory deadline for action on its PSD permit, it believes that the AEP would meet the newly adopted standards in any event, and that natural gas-fueled combined-cycle power plants similar to the AEP have been determined by permitting agencies to be BACT for greenhouse gases. Region 9 does not believe that it is necessary or appropriate to conduct a substantive evaluation of whether the AEP would meet PSD requirements in the context of this analysis of APC’s request for an extension of the commence construction deadline for the AEP, and the Region is not relying in any way on APC’s assertions in this regard in reaching our determination at this time that an extension of the deadline for commencing construction in the PSD permit for the AEP is justified.

permit decision” includes a decision to “modify” a permit, but EPA has not yet promulgated more specific provisions regarding modifications of PSD permits. See 40 CFR 124.5(g). Therefore, the precise scope and meaning of the term “modify” as applied to a PSD permit is not clear from the Part 124 regulations. In the absence of controlling regulations, EPA views the modification of a PSD permit to include material changes to substantive terms and conditions that govern the construction and operation of the source. We do not interpret the term “modify” in this context to include the decision to issue an administrative amendment to extend the deadline for commencing construction under the PSD permit without reconsideration or amendment of the substantive conditions of the permit. Nevertheless, in light of the level of public interest to date in the PSD permit decision issued by EPA for the AEP and the ongoing litigation concerning this permit decision, Region 9 will provide notice in the Federal Register of this action and the opportunity to request judicial review of the Region’s decision to grant APC’s request for an 18-month extension of the commencement of construction deadline in the PSD permit for the AEP.

We note that in 1988, Wayne Blackard, then Chief of Region 9’s New Source Section (a first-line supervisor), issued a policy memorandum describing how Region 9 intended to exercise its discretion at that time in determining whether granting an extension of the 18-month commencement of construction deadline was justified per 40 CFR 52.21(r)(2). The approach described in the 1988 memorandum is not, and never has been, the exclusive means by which an applicant can show that an extension of the 18-month expiration period is justified. The 1988 policy memorandum does not purport to interpret the terms of 40 CFR 52.21(r)(2) and does not state that the regulation requires the approach outlined in the memorandum to show that an extension of a previously issued PSD permit is justified. Accordingly, the 1988 policy memorandum should not be viewed as a controlling EPA interpretation of 40 CFR 52.21(r)(2), but rather should be regarded as a prior policy statement.

This 1988 Region 9 policy would effectively have the permittee submit a complete re-analysis of PSD permit requirements and have the Region conduct another comprehensive PSD review, including a re-analysis of BACT, a re-analysis of air quality impacts and PSD increment consumption, and an analysis of any new PSD requirements, and conduct a public participation process under 40 CFR Part 124, in order to determine that a PSD permit extension is justified under 40 CFR 52.21(r)(2). However, application of this 1988 policy makes little or no practical distinction between the extension of an existing PSD permit and an applicant’s having to apply for a new permit. In order to give meaning to the extension provision in section 52.21(r)(2) of its regulations, EPA is not inclined to continue applying the 1988 policy. After further consideration of the practical impact of the 1988 policy, Region 9 has determined that it is more appropriate and consistent with the terms of 52.21(r)(2) to evaluate on a case-by-case basis whether an applicant has shown that an extension of a PSD permit is justified under the particular facts of each situation, including a case-by-case consideration of the appropriate factors to be evaluated and the appropriate process to be employed in determining whether to grant such request in light of the particular facts. As 40 CFR 52.21(r)(2) does not specify that any particular criteria must be shown or process followed, this case-by-case approach is consistent with the regulation and the discretion that it provides to EPA. And, in this case, in light of all of the factors described above, Region 9 has determined that it would not be equitable, or an appropriate use of limited EPA resources, to require APC and Region 9 to re-analyze substantive PSD requirements for the AEP or to conduct a public participation process in

order to show that the requested 18-month extension of the commencement of construction deadline is justified.

We also note that EPA has been considering what policy to apply to PSD permit extension requests for many years. In addition to the 1988 Region 9 policy described above, in 1985, an EPA headquarters office developed a draft policy addressing PSD permit extension requests that was distributed for review among EPA staff. Memorandum from Darryl D. Tyler, Director, Control Program Development Division, Revised Draft Policy on Permit Modifications and Extensions (July 5, 1985). EPA headquarters also developed a similar (but not identical) draft policy dated June 11, 1991. However, these documents were never issued in final form. Because these documents were drafts that were never finalized, they did not establish a controlling interpretation of the text in 52.21(r)(2) that precludes EPA from accepting the type of showing made in this case as sufficient to demonstrate that an extension of the permit issued to APC is justified.

These draft EPA headquarters policies called for public notice and comment for PSD permit extensions and a substantive re-analysis of BACT and in some instances other PSD requirements. The draft policies discussed the role of the permit expiration requirement in ensuring that PSD analyses, in particular BACT, be current for PSD-permitted projects. These draft policies were based on the idea of allowing extensions readily but requiring substantive review to ensure that the BACT limits and other conditions in the original permit remained current. EPA developed this draft approach as an alternative to other approaches, such as requiring a showing of impossibility or economic impracticability. In the 1985 and 1991 draft policies, EPA explained that the latter approaches presented varying degrees of subjectivity and certain difficulties in the factual analysis, which these draft policies sought to avoid. However, the drafts did not discuss how requiring substantive review of a prior PSD permitting decision and conducting an additional public participation process could obscure the distinction between extension of an existing permit and requiring the applicant to demonstrate that it is eligible for a wholly new permit. They also did not recognize the potential downsides of such an approach, such as the potential for substantial further delay or the significant resource burden that may result from such analysis in the context of even a relatively brief extension request. Nor did they demonstrate that such an approach was necessary when other factors may otherwise provide a reasonable justification for an extension. The intensive substantive review and associated public participation process called for in the 1988 Region 9 policy statement further illustrates this tension between permit extension and new permits.

With regard to the procedures for permit extension, the 1985 and 1991 draft policies called for public comment as part of EPA's consideration of an extension request. However, the policies deemed this process advisable in the context of other elements of the policies that called for substantive review of PSD requirements such as BACT before granting the extension. Where an applicant has demonstrated that an extension is justified without substantive reconsideration of the permit conditions, Region 9 does not see the same basis for providing an opportunity for public comment on an extension of the deadline for commencing construction in a PSD permit.

In the case of the Avenal PSD permit extension, the circumstances described above demonstrate clearly that the applicant faces uncertainty that is making it economically impractical, if not financially impossible, for the source to proceed with construction. Region 9 has not experienced difficulty with the analysis of the facts showing economic impracticability in

this instance, contrary to the concerns regarding the potential for such difficulty that were expressed in the 1985 and 1991 draft policies, and believes that the facts show that an extension is justified in this case without reconsideration of the substance of the original PSD permitting decision. Thus, we do not believe that the considerations that motivated the approach described in the 1985 and 1991 draft policies are present in this case. In fact, the unique facts of this case help demonstrate why a different approach – one that gives fuller effect to the discretion provided in the text of 40 CFR 52.21(r)(2) by allowing EPA to make a case-by-case decision whether an extension is justified based on the particular facts of the case – is reasonable under that regulation. Furthermore, we find that in this case, the totality of the circumstances, based on the specific factors present in this case that are described above, including in particular the lengthy procedural history of the PSD permit decision for the AEP, and the fact that this initial permit decision remains subject to judicial review before the Ninth Circuit, and that the Ninth Circuit has not yet issued a substantive ruling regarding EPA’s decision to grandfather the AEP permit application from certain new PSD requirements, support our determination to grant the 18-month extension requested by APC in this case without further substantive PSD analysis or public process.

In addition to these considerations, other factors such as relative length of the requested extension, our goal of moving toward finality in the still-pending PSD permit proceeding for the AEP, avoiding the significant additional resource burden that we believe likely would be associated with more substantive PSD analysis and process in this case, and considerations of equity, provide further support for our conclusion that it is appropriate in this case to issue this determination without requiring or conducting additional substantive PSD analysis and public process. In this case, all of these considerations lead us to conclude that this approach is more appropriate than requiring further PSD analyses and additional public participation as per the 1988 Region 9 policy and draft EPA headquarters policies for PSD permit extensions.